Supreme Court, U.S.
FILED
SEP 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-528

In The

Supreme Court of the United States

October Term, 1989

STEPHEN TOWNE,

Petitioner,

v.

TOMLIN PROPERTIES, et al.,

Respondents.

On Petition for Writ of Certiorari To The United States Court of Appeals For the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the court of appeals correctly determine that petitioner's rights to conduct additional discovery and to prove at trial his claims for violations of RICO were not substantially prejudiced by a discovery ruling prohibiting him from obtaining documents relating to real estate investments in which he had no interest?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 2

I. The Discovery Ruling of Which Petitioner Complains Was Not Prejudicial to His Substantial Rights 2

CONCLUSION 5

TABLE OF AUTHORITIES

Page

CASES

Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985) 4

Marshall & Ilsley Trust Co. v. Pate, 819 F.2d 806 (7th Cir. 1987) 3

Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985)..... 4

RULES

Fed. R. Civ. P. 61 2

Fed. R. Evid. 103(a)(2) 4

Sup. Ct. R. 17 2

STATUTE

Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.* ..... *passim*

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BRIEF IN OPPOSITION

Respondents Tomlin Properties, Tomlin Properties, Inc., D. O. Tomlin, Jr., Erline Tomlin, and Kenneth Houston ("respondents") respectfully file this Brief in Opposition to the Petition for Writ of Certiorari of petitioner Stephen Towne ("petitioner").

STATEMENT OF THE CASE

Respondents object to petitioner's statement of the case to the extent it attempts to offer "facts" that were never

proved. Indeed, the judgment below was from a civil RICO trial that lasted no longer than fifteen minutes – a trial in which petitioner waived a jury, called no witnesses, and offered no evidence other than random and unexplained documents later held to be largely inadmissible. Respondents would instead refer this Court to the correct statement of the case set out in the opinion of the United States Court of Appeals for the Fifth Circuit.

REASONS FOR DENYING THE WRIT

I. The Discovery Ruling of Which Petitioner Complains Was Not Prejudicial to His Substantial Rights.

In an effort to invoke this Court's exercise of discretionary review, petitioner has incorrectly interpreted the opinion of the court below and has raised an alleged conflict with another court of appeals that is illusory and non-existent. As was the case in the court below, petitioner has once again failed to demonstrate, as Federal Rule of Civil Procedure 61 requires, that the challenged discovery ruling was harmful to his substantial rights during pretrial discovery and at trial, in which he called no witnesses and offered few admissible documents to support his RICO claim. This case does not present for review any of the hard questions that courts have faced or will face under RICO, thus necessitating this Court's review under Supreme Court Rule 17. Instead, it involves only petitioner's self-imposed problems of proof stemming from a belated recognition that his RICO claim was flimsy, if not frivolous.

Petitioner's central argument before this Court is that, in conflict with *Marshall & Ilsley Trust Co. v. Pate*, 819 F.2d 806 (7th Cir. 1987), the opinion below required him to show direct injury from *all* the predicate acts adding up to a pattern of racketeering. Contrary to this argument, however, respondents have never contended and the court of appeals did not hold that petitioner was required to show that all the predicate acts adding up to a pattern of racketeering caused him direct injury. Rather, the problem with petitioner's case was that, despite having every piece of paper from the Frisco 124 Venture (the only transaction in which he had a financial interest) and having every opportunity to depose respondents or to subpoena any other witness, petitioner did not try and was unable to prove at trial a *single* act of mail fraud, wire fraud, commercial bribery, or any other predicate act that caused him *any* injury. In the face of petitioner's absolute failure to prove a single instance of injurious and illegal conduct in the management of his *own* venture, his persistent cry for extraneous documents – with which he hoped to show racketeering injury to investors in *other* venturers – has a hollow and meaningless ring.

Given petitioner's failure to offer any meaningful proof at trial, the court of appeals plainly was correct in concluding that he was not substantially prejudiced by the discovery ruling. Although the requested documents relating to other transactions and other investors arguably might have been *sufficient* to prove a pattern under RICO case law, petitioner has never attempted to demonstrate that such documents were *necessary* to show a pattern. Indeed, by not even attempting to show at trial whether a pattern of racketeering could or could not be

established through the voluminous documents that he did have relating to the Frisco 124 Venture or through other testimony, petitioner has provided this Court no reason to find that he was actually harmed by the discovery ruling. Moreover, by conducting no discovery at all after the ruling and by calling no witnesses at trial, petitioner cannot show that he was prohibited from obtaining or proving any desired information through alternative means. In short, even if the requested documents were relevant to the element of a pattern, petitioner has demonstrated no prejudice whatsoever by his inability to obtain them.

This conclusion is not affected by petitioner's new and belated argument that he was entitled to documents relating to other ventures so that he could establish "an indirect causal relationship between his damages and the racketeering activity" that may have occurred in those other ventures. (Petition at 11). One flaw in this argument is that it was never suggested to the trial court as a basis for admitting the excluded evidence, and thus was not preserved for appellate review under Federal Rule of Evidence 103(a)(2). Moreover, petitioner has never shown or explained to any court how alleged predicate acts that may have injured other investors could have caused him *any* injury, either directly or indirectly. Petitioner's argument simply ignores this Court's admonition that " '[a] defendant who violates section 1962 is not liable for treble damages to everyone he might have injured by *other conduct*, nor is the defendant liable to those who have not been injured.' " *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496-97 (1985)(quoting *Haroco, Inc. v. American Nat'l. Bank & Trust Co.*, 747 F.2d 384, 398 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985))(emphasis added). Rather, a "plaintiff

. . . can recover only to the extent that . . . he has been injured in his business or property by the conduct constituting the violation," *id.* at 496, and here petitioner did not and could not show any such injurious conduct.

CONCLUSION

The United States Court of Appeals for the Fifth Circuit was correct in holding that petitioner had failed to show substantial prejudice from the discovery ruling of which he complains. Accordingly, the Petition for Writ of Certiorari should in all respects be denied.

Respectfully submitted,

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